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Supreme Court, U.S.
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No. 91-1160

In The

Supreme Court of the United States

October Term, 1991

A. J. ARAVE, WARDEN,

Petitioner, Cross-Respondent,

v.

THOMAS E. CREECH,

Respondent, Cross-Petitioner.

Cross-Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Facts relevant to Creech's Cross-Petition for a Writ of Certiorari are reviewed in the warden's petition for a Writ of Certiorari and need not be repeated here.

REASONS FOR DENYING THE WRIT

Creech's Cross-Petition for a Writ of Certiorari is concerned with the circumstance that Creech, acting against his lawyer's advice and over his lawyer's specific objection to the court, insisted on entering a guilty plea, about which he was extensively examined by the court before the plea was accepted. Although Creech contends that issues of voluntariness are raised by the court of appeals' refusal to hold that it was error to deny Creech the right to withdraw his plea, this case is not an appropriate one for the development of rules related to voluntariness of pleas. Creech chose between the right to allow counsel to conduct his case and the right to conduct his case himself. His later assertions that it was disadvantageous to do so have little to do with voluntariness.

I.

CERTIORARI SHOULD BE DENIED WITH RESPECT TO CREECH'S CLAIM THAT HE ENTERED AN INVOLUNTARY GUILTY PLEA

Creech's assertion that the court of appeals erred by determining that his "uncounseled, involuntary guilty plea" was harmless error raises no important federal

question that should be considered by this court, principally because Creech's contentions are factually and legally incorrect.

Creech argued to the court of appeals that he should have been permitted to withdraw his guilty plea because he was not made aware of what he has called the defense of "imperfect self-defense," and that because he did not have this information his plea was not voluntary and intelligent. *Creech v. Arave*, 947 F.2d 873 (9th Cir. 1991). The court of appeals, concluding that these arguments differed in form but not in substance, held that Creech had not been ineffectively represented, then went on to state that even if one were to assume that "his attorney's performance was not reasonable, . . . Creech's ignorance of the possible defense of 'imperfect self-defense' was harmless beyond a reasonable doubt." (Appendix, p. 18.)

In fact, as the court of appeals recognized, "any omission on [the part of Creech's attorney] was not the result of his incompetence as counsel. Creech simply did not allow his counsel to inform him of the elements of the offense or possible defenses." (*Creech v. Arave*, Appendix, p. 12.)

Creech's guilty plea resulted from a personal decision made over the objection of counsel. The record reflects that on August 28, 1981, the state district court convened a hearing to take up a demand by Creech, presented by letter to the court, that he be allowed to enter a plea of guilty to the charge of first degree murder. Creech's counsel stated to the court that such a course of action was contrary to his advice. He sought a continuance to research the issue, which was opposed by the

prosecutor on the ground that, "there has never been a representation made to the court or to me that Mr. Creech is not fully competent to make his own decision within the realm of the law." Creech took the stand and insisted that he be permitted to plead guilty, irrespective of his counsel's advice. His attorney then moved to withdraw from the case. The motion was denied because the court believed that Creech should have the assistance of counsel to "inform him under the law of what's going on."

Creech's attorney, Rolf Kehne, stated to the court that Creech had been seen by a psychologist for evaluation, and that the evaluations were not completed. He advised the court that, "We would like to reserve the right to come back to the court and withdraw the plea if it turns out that Mr. Creech is in some way not competent to make this decision." The state had no objection.

The prosecutor made a representation respecting the facts he intended to prove and stated that he would seek the death penalty.

Creech was then examined by the court respecting his plea. He testified under oath that he desired to plead guilty to the offense of first degree murder, understanding that the death penalty was possible. He also testified that he had received no promises of leniency; that he had not been coerced; that he had no reason to believe that the death penalty would not be imposed; that he had not been threatened in order to coerce his plea; that he understood that the court was not bound by any recommendations respecting punishment that any party might make; that he understood that a sentencing hearing would be

conducted; that his prior criminal record would be considered at sentencing; that the confessions he made to police officers did not induce his plea; that he was not addicted to the use of drugs nor under the influence of alcohol or drugs; that he had no psychological or mental problems that would have a bearing on this plea; that he was guilty and that such was the reason he was pleading guilty; that his attorney had advised him not to enter a plea of guilty; that he had sufficient time to discuss the matter with his attorney; that he had explained to Mr. Kehne everything he knew about the charge; that Mr. Kehne had advised him to his satisfaction of his rights, defenses and the possible consequences of a plea of guilty; that his plea was the result of his own voluntary decision; that by pleading guilty he was giving up his constitutional rights to a trial by jury, to confront his accusers and to avail himself of the privilege against self-incrimination; that he was "giving up any defense you have to the charge at all;" and that he understood that he would be admitting the truth of the charge by pleading guilty. Creech told the court that he understood that he was giving up any claim that the court had not treated him fairly in the proceedings, and that he was satisfied with the work of his attorney. He was questioned about his understanding of first degree murder, and he responded with an answer suggesting that he believed that he had to have premeditated the offense.

THE COURT: What, as you understand it, does a person have to do to be guilty of the charge of first degree murder? What does it mean to you?

A: He has got to think about doing it.

Q: In killing someone?

A: In killing someone.

Q: Do you understand, sir, that if I accept your plea of guilty, then it's too late to plead not guilty?

A: Yes, sir.

Creech was then asked to tell the court in his own words what he had done, and he answered:

A: I had some problems with a guy named Jensen. And we got into an argument earlier in the day and I fought with him. Then later on that same day we got into it again and I killed him.

Q: I gather you've, from Mr. Harris' statement, apparently did this with a sock with some batteries in it or something like that?

A: Yes sir.

Q: Is that correct?

A: Yes sir.

The prosecuting attorney explored this question further:

MR. HARRIS: Mr. Creech, did you intend to kill Mr. Jensen?

MR. KEHNE: I'll object. It's not within the statute.

THE COURT: Overruled. You may answer.

THE WITNESS: When I first had the fight with him no. But the second time, yes, I did intend to kill him.

Q: That was later in the day?

A: Yes sir.

A: Did you take action to kill him after he was no longer a threat to you? Was in no condition to hurt you?

A: Yes I did.

Q: What did that include? What did you do?

A: I kicked him in his throat and his head.

Q: Was that after he was unconscious?

A: He wasn't all the way unconscious, but he was down on the floor.

Q: Did you hit him with the sock after he had fallen to the floor?

A: I don't remember. The sock busted and the batteries fell out. I'm not sure when that happened.

Q: Did they bust after you hit him with the sock?

A: Yes, sir.

Q: Did you think he was going to die after you left the cell the final time?

A: I thought he would probably.

The evidentiary record of the case made it quite plain, as the court of appeals noted, that Creech could not possibly have prevailed with any kind of justifiable homicide defense, perfect or otherwise. Importantly, the "imperfect self-defense" justification is not part of Idaho law. To the extent that such a defense attempts to substitute a defendant's subjective fears leading to the use of deadly force for an objective assessment of the reasonableness of the defendant's homicidal acts, the

"imperfect self-defense" theory has been rejected by the Idaho Supreme Court. *State v. Johns*, 736 P.2d 1327 (Idaho 1987). It would hardly have been appropriate for the Ninth Circuit Court of Appeals to hold that the state trial court was obliged to insure that Creech was expressly informed of the elements of a nonexistent defense.

Moreover, this case is the wrong choice for considering the question "whether a defendants uncounseled, involuntary guilty plea constitutes harmless error." If Creech were ill informed about the law governing his crime, it was because he *insisted* on entering a plea under such conditions.

In *Faretta v. California*, 422 U.S. 806 (1975), this Court held that the legal destiny of the accused is always, constitutionally, in his own hands and not the hands of his lawyer.

> [W]e confront here the near universal conviction on the part of our people, as well as our courts, that forcing a lawyer on an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so. *Faretta*, 422 U.S. at 817.

The state trial court would have violated the principle quoted above had it gone any further than it did in trying to discourage Creech from refusing his lawyer's advice. The trial judge thoroughly examined Creech about his decision and about his consultations with his attorney. Creech testified under oath, in the manner described previously, that he was fully aware of the nature of the charges against him, his rights, and the possible consequences of a guilty plea.

The role of the trial judge who must respond to a legal judgement the defendant has reserved to himself is limited to insuring that the defendant has been informed of the hazards of the course he has chosen to follow. In *United States v. Harris,* 683 F.2d 322 (9th Cir. 1982), the court of appeals pointed out "that there is a narrow path to be carefully treaded between the *Faretta* right to refuse the assistance of counsel and the assurance that the defendant's refusal of such services is made with full awareness of the risks of doing so." 683 F.2d at 324. An effort by the trial judge to persuade or pressure the defendant to accept his counsel's advice when he does not wish to do so is clearly an infringement on the *Faretta* principle that the defendant is the master of his own case.

A voluntary decision to plead guilty rather than avail oneself of the right to go to trial with the assistance of counsel is not a waiver of counsel, to be tested by considerations of intelligence and knowingness. Instead, it is simply the exercise of one of two different constitutional rights. In *United States v. Curcio,* 694 F.2d 14 (1982), the Court of Appeals for the Second Circuit discussed the difference between a "waiver" and the choice of one constitutional right over another. In *Curcio,* two brothers desired to be jointly represented by the same lawyer, notwithstanding possible problems of conflicts of interest. The trial judge, concerned with the right to conflict-free representation, held that one of the brothers had not made a knowing and intelligent waiver of the right, even though he was "a person of experience" with criminal prosecutions. *Curcio,* 694 F.2d at 26. The defendant was ordered to obtain other counsel.

The Court of Appeals reversed the trial court's order in *Curcio,* holding that the right to one's choice of counsel was not to be mechanically subordinated to the differing right to conflict-free representation. The court viewed the choice between two constitutional rights as simply a choice, not a matter of waiver:

> It seems to us that a case where defendant is vigorously asserting his right to counsel of his choosing is not truly a case of "waiver" at all; it is rather a decision to assert one constitutional right rather than another [citations omitted]. This is more than a semantic quibble; characterizing Curcio's choice as one of "waiver" of the right to conflict-free representation invites judicial scrutiny that is excessively paternalistic and insufficiently protective of the competing right to counsel of choice. 694 F.2d at 22, note 8.

By the same rationale, Creech's present claim that the Court should stand more firmly between him and his decision to plead guilty ignores the basic premise of *Faretta.* This Court could only review the question presented by Creech if it accepts the premise that a voluntariness question necessarily results from a defendant's insistence on ignoring the advice of this attorney.

II.

NO IMPORTANT FEDERAL QUESTION IS PRESENTED BY PETITIONER'S CLAIM THAT THE COURT OF APPEALS ERRED IN HOLDING THAT A CRIMINAL DEFENDANT MAY PLEAD GUILTY TO A CAPITAL CRIME WITHOUT COUNSEL AND WITHOUT BEING ADVISED OF THE DANGERS OF PROCEEDING WITHOUT COUNSEL

Creech has offered a second question for review based on the contention that he pled guilty to a capital offense "without counsel and without being advised of the dangers of proceeding without counsel." Cross-Respondent sees this as simply a different formulation of the question whether Creech's guilty plea should be considered constitutionally deficient because it was entered against the advice of counsel, notwithstanding Creech's personal control over his case. The factual and legal deficiencies of Creech's first claim, discussed above, apply equally to the second question presented.

CONCLUSION

The cross-petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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